

**United Technologies Corporation and District 91,  
International Association of Machinists and  
Aerospace Workers, AFL-CIO. Case 1-CA-  
16360**

February 10, 1982

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On May 11, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The principal issue in this case is whether Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a ban on all employee solicitation during paid working and nonworking time. The Administrative Law Judge concluded that the doctrine of *res judicata* barred litigation of the issue because the rule in question had been found lawful in an earlier proceeding.<sup>1</sup> Accordingly, the Administrative Law Judge recommended dismissal of the complaint. We are of the opinion, however, for the reasons explained below, that the earlier Decisions do not bar consideration of the validity of the rule alleged to be unlawful in this proceeding, and we further conclude that Respondent's no-solicitation rule violates the Act.

The record establishes that since at least 1964 and until January 1978, Respondent maintained a rule in its employee personnel handbook<sup>2</sup> which prohibited all solicitation "during working hours on company premises without [Respondent's] specific prior approval . . . ." The handbook further provided that employees who violated the rule against solicitation would be subject to "disciplinary action." In addition, throughout the relevant period, Respondent's collective-bargaining agreement with the Union prohibited union-related solicitation. It provided:

There shall be no solicitation of employees for union membership or dues conducted upon the premises of the Company during working hours by the Union, its representatives, or by employees; nor shall there be any distribution or collection of payroll deduction assignment cards for union dues and initiation fees conducted on the premises of the Company during working hours by the Union, its representatives, or by employees.

In 1969, the Board considered the lawfulness of Respondent's rule against solicitation in two separate cases.<sup>3</sup> In the decision published at 180 NLRB 278, the Board adopted the Trial Examiner's conclusion that the Union's contractual waiver of the employees' right to engage in solicitation redeemed Respondent's disparately strict enforcement of its handbook rule regarding union-related solicitations. Enforcing the Board's Orders, the Court of Appeals for the Second Circuit commented that it "saw no reason to invalidate the [parties'] clear agreement" to disallow union-related solicitation and found the rule, its enforcement, and the waiver lawful.<sup>4</sup>

In 1978, Respondent revised the terms of its rule against solicitation. Included in a general revision of the handbook rules posted to employees on January 26 of that year was a solicitation ban which provided:

The following practices are prohibited . . .

\* \* \* \* \*

5. Gambling, taking orders, selling tickets or any type of unauthorized solicitation on company property. This prohibition includes soliciting employees for union membership, including the distribution and collection of dues assignment cards or money for union dues, initiation fees, or assessments during working hours.

Respondent admitted that this prohibition applies to all paid working and nonworking time, regardless of whether solicitation would interfere with production. The collective-bargaining provision, noted above, remained in effect.

Early in 1979, Respondent dismissed two employees for union-related solicitation during a break.<sup>5</sup> Soon thereafter, pursuant to rule 5, em-

<sup>1</sup> See *United Aircraft Corporation*, 179 NLRB 935 (1969), and 180 NLRB 278 (1969), *enfd.* 440 F.2d 85 (2d Cir. 1971).

<sup>2</sup> The sole facility at issue herein is Respondent's Hamilton Standard Division in Windsor Locks, Connecticut.

<sup>3</sup> *Supra*, fn. 1.

<sup>4</sup> 440 F.2d at 96.

<sup>5</sup> The Union prevailed in a subsequent grievance proceeding concerning the dismissals. The arbitrator concluded that Respondent had disparately enforced the rule against solicitation. He did not reach the issue of the rule being overly broad. These discharges are not at issue here.

ployee Robert Lay submitted a request to Respondent for permission to solicit for funds for the families of the discharged employees. On January 22, 1979, Respondent denied Lay's request. On two occasions during the following weeks, two of Respondent's internal security agents told Lay that they were investigating "very serious charges" and asked him about the request to solicit that he had submitted. On February 9, 1979, a Respondent agent warned another employee, Andrew Sullivan, that he would have to be disciplined for taking a collection for the discharges' families in violation of the no-solicitation rule. Respondent's security agents questioned Sullivan again 2 weeks later and threatened enforcement of the no-solicitation rule.<sup>6</sup>

In considering the General Counsel's allegation that Respondent unlawfully maintained and enforced an overly broad ban on solicitation, the Administrative Law Judge observed first that the 1978 revision of Respondent's rules rephrased but did not alter the content of the original rule, previously considered by the Board and the court of appeals. The Administrative Law Judge noted that the Board and court had found a "valid prohibition of solicitation" in that earlier proceeding. Accordingly, the Administrative Law Judge ruled that the matter was previously litigated and thus barred under the doctrine of *res judicata*. Accordingly, he recommended dismissal of the complaint.

As indicated above, the 1971 decisions cited by the Administrative Law Judge premised the lawfulness of Respondent's enforcement of its no-solicitation rule on the principle that the Union could contractually waive the employees' right to engage in the solicitation prohibited in the rule. In 1974, however, the Supreme Court in its decision in *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, rendered this principle invalid. In *Magnavox*, the union's collective-bargaining agreement with the employer contained a provision, similar to the one in the instant proceeding, which waived the employees' right to engage in the distribution of union literature. Nevertheless, the Supreme Court approved the Board's finding that the employer had violated Section 8(a)(1) of the Act by maintaining a rule forbidding distribution of literature in nonworking areas during nonworking time. The court reasoned that:

The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and

so long as the in-plant solicitation is on non-working time, banning of that solicitation might seriously dilute [Section] 7 rights.<sup>7</sup>

Since the Supreme Court's decision overrules the fundamental assumption of the Board and the court of appeals in the earlier proceeding, that a union can waive employees' right to engage in all solicitation, we conclude that the prior litigation in *United Aircraft Corporation*, *supra*, does not bar consideration of the instant matter.

We find that Respondent's maintenance of rule 5, which prohibits employee solicitation during paid nonworking time, violates the well-established standards which govern the permissible breadth of solicitation limitations. *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793 (1945); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). That Respondent's rule prohibits union solicitation during "working hours" establishes its facial invalidity.<sup>8</sup> Moreover, Respondent has admitted that the rule applies to authorized break periods for which employees are paid. In sum, we conclude that this rule is an impermissible infringement on employees' Section 7 rights. In accord with *N.L.R.B. v. Magnavox Co.*, *supra*, we also note that Respondent's ban on solicitation is not rendered lawful by the provisions of Respondent's collective-bargaining agreement with the Union. Accordingly, we conclude that Respondent's maintenance, and its enforcement within the 10(b) period against employees Lay and Sullivan, of a rule restricting employee solicitation during all paid nonworking time unlawfully interfered with employees' Section 7 rights and violated Section 8(a)(1) of the Act.<sup>9</sup>

#### CONCLUSIONS OF LAW

1. The Respondent, United Technologies Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 91, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by maintaining and enforcing a no-solicitation rule among its employees prohibiting

<sup>7</sup> 415 U.S. at 325.

<sup>8</sup> See *T.R.W. Bearings Division, a Division of T.R.W. Inc.*, 257 NLRB 442 (1981). See also *Essex International, Inc.*, 211 NLRB 749 (1974). While in *T.R.W.*, the Board overruled *Essex International*, it did so solely with regard to the Board majority holding in *Essex* that rules prohibiting solicitation during "working time" (emphasis supplied) are presumptively valid. However, all the Board members who participated in *Essex* agreed that rules, similar to the rules in issue here, prohibiting solicitation during "working hours" (emphasis supplied) are presumptively invalid unless properly clarified.

<sup>9</sup> We note that Respondent has not alleged any special considerations of production or discipline which might warrant limitation of its employees' right to engage in such solicitation.

<sup>6</sup> The findings concerning Respondent's enforcement of rule 5 against Lay and Sullivan are based on uncontroverted evidence admitted during the hearing without objection by Respondent.

union solicitation during all paid nonworking time, has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Such actions shall include the rescinding of its rule found to be unlawful herein and the posting of notices to employees.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Technologies Corporation, Windsor Locks, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing its rule prohibiting employees from engaging in union solicitation during all paid nonworking time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind its rule which prohibits employees from engaging in solicitation during all paid nonworking time.

(b) Post at its facility in Windsor Locks, Connecticut, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT maintain and enforce our rule which prohibits union solicitation during all paid nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL rescind and abrogate our rule which prohibits union solicitation during all paid nonworking time.

UNITED TECHNOLOGIES CORPORATION

#### DECISION

#### STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard in Hartford, Connecticut, on November 12, 1980.

The charge in this proceeding was filed by District 91, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called the Union), on July 20, 1979. The complaint and notice of hearing issued on April 7, 1980, alleging that United Technologies Corpo-

<sup>10</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ration<sup>1</sup> (herein called Respondent) has, since January 26, 1978, maintained and enforced a no-solicitation rule in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent operates several plants in the State of Connecticut, including plants located in East Hartford, Manchester, Middletown, Southington, Windsor Locks, and Broad Brook. It is engaged in the manufacture, sale, and distribution of aircraft engines, helicopters, aircraft accessories and parts, electronic devices and components thereof, and related products. In addition, Respondent operates plants in the States of Florida, New York, California, and the Commonwealth of Pennsylvania. In connection with its operations in the State of Connecticut, Respondent annually purchases and receives from outside the State of Connecticut goods and materials valued in excess of \$1 million and also ships from its plants in the State of Connecticut to points and places outside the State of Connecticut goods and materials valued in excess of \$1 million. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION

The Union is, and has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE FACTS

The sole facility involved in this proceeding is Respondent's Hamilton Standard Division, Windsor Locks, Connecticut.

Respondent's vice president of personnel and industrial relations, Frederic M. Dustin, testified that since at least 1964, Respondent has maintained an employee personnel handbook, which provides *inter alia*:

5. Gambling, taking orders, selling tickets, or soliciting money or any other type of solicitation. (Refer to detail policy concerning solicitations on page 25.)

Page 25 of the handbook provides as follows:

*Solicitations.* Gambling in any form, including baseball pools, football pools, check pools, or lotteries of any kind, will not be permitted at any time on company premises. Any employee who violates this rule either by soliciting or contributing in any way to such activities will be subject to disciplinary action.

Except for company approved charitable solicitations conducted on a plant-wide basis, there shall be

no solicitation of money or any other thing during working hours on company premises without the specific prior approval of the department manager or his delegate for each such solicitation. It should be understood that such authorization by a department manager does not in any way constitute endorsement of the solicitation and an employee is entirely free to contribute or not as he sees fit, whether such solicitation is occasioned by such events as marriage, birth, anniversary, illness, misfortune, or death occurring to a fellow employee or a member of his family. Any employee who violates this rule either by soliciting or contributing to an unauthorized solicitation will be subject to disciplinary action.

When the department manager or his delegates authorizes a solicitation, the employee who has been authorized to conduct it will be provided with an approved authorization form which the solicitor must retain and produce on request of any employee who is solicited for a contribution. It is the responsibility of the employee being solicited to make certain that the solicitation has been authorized.

With rare exceptions all such solicitations will be carried on only in nonworking areas such as cafeterias and locker-rooms during the employees' own time. In every case the solicitation must be so conducted that it does not interfere in any way with the orderly and efficient operation of the department or section involved or with the employees who are at work in the area. Sunshine clubs or any other such dues collecting organizations are not considered as falling in the pattern described and solicitation for such organizations will not be authorized.

The limited solicitation provisions permitted are like the provisions permitted under our smoking rule in that only through the continued cooperation of employees can these provisions be continued.

In January 26, 1978, Respondent revised its general rules. Rule 5 was revised as follows:

No. 5. Gambling, taking orders, selling tickets, or any type of unauthorized solicitation on company property. This prohibition includes soliciting employees for union membership, the distribution and collection of dues assignment cards for money for union dues, initiation fees, or assessments during working hours.

During the period that these rules were in effect the collective-bargaining agreements between Respondent and the Union contained the following clause in article IV:

There shall be no solicitation of employees for union membership or dues conducted upon the premises of the Company during working hours by the Union, its representatives, or by employees; nor shall there be any distribution or collection of payroll deduction assignment cards for union dues and

<sup>1</sup> Formerly known as United Aircraft Corporation.

initiation fees conducted on the premises of the Company during working hours by the Union, its representatives, or by employees.

The current collective-bargaining agreement between the parties is in effect until midnight April 24, 1983. Article 5 of this agreement, and previous agreements, provides for the checkoff of union dues and initiation fees.

The testimony of Richard Lay, which was received in evidence as General Counsel's Exhibit 2, reflects that Respondent, on January 22, 1979, denied an employee's request to take up a collection for the families of two employees who had been discharged for union solicitation during paid coffeebreaks.

The facility involved in this proceeding contains three buildings. Buildings 1 and 2 do not provide coffeebreak areas, also referred to in the testimony as "consumption breaks." Sometime in 1977, Respondent set aside consumption areas for purposes of "consumption breaks" in building 3 only. Although these consumption breaks involved nonworking time in nonworking areas, employees are paid while on these breaks. The fact that the rule was applied to union solicitation during consumption breaks is evidenced by the arbitration award received in evidence, as General Counsel's Exhibit 4, involving the discharges of Michael Londraville and Gerald Gregoire. These individuals were terminated for engaging in union solicitation during paid breaktimes.

It is clear from the testimony that the rule applies to all employees as long as the employee is being paid for the time, without regard to whether solicitation has interfered with or impeded production. Whether the rule has been disparately applied is not an issue in this case. The General Counsel contends that the rule is, on its face, overly broad. Respondent raises, as an affirmative defense, that the issue is *res adjudicata*, because it was resolved in previous litigation in *United Aircraft Corpora-*

*tion*, 179 NLRB 935 (1969), and 180 NLRB 278 (1969), *enfd.* 440 F.2d 85, 95-97 (2d Cir. 1971).

#### Conclusions and Analysis

It is clear from the instant case and the cases considered by the Board and the court cited earlier, that they equated the term "working hours" with "paid time." The Board, the court, and the arbitrator's decisions addressed themselves to the operative sections of the personnel handbook, Respondent's general rules, and the contract. The 1978 revision did not change the rule, but paraphrased the same contract provision and rule which were considered by the Board and the court in 1971. They found a valid prohibition of solicitation.

In *Essex International, Inc.*, 211 NLRB 749 (1974), the Board distinguished "working hours" and "working time." In that case the Board was not faced with a situation as in this case, where the parties by contract agreed to, and understood, that time paid for by Respondent is not to be utilized for solicitation for union purposes. As Respondent points out, the *quid pro quo* was its agreement to deduct union dues from employees' wages, and forward them to the Union.

Accordingly, in my opinion the issue in this case has been fully litigated and is *res adjudicata*. Therefore, I recommend that this complaint be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The acts and conduct of Respondent do not constitute unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[Recommended Order for dismissal omitted from publication.]